No. 17-1091

IN THE

Supreme Court of the United States

TYSON TIMBS, *et al.*,
Petitioners,
v.
STATE OF INDIANA,
Respondent.

On Writ of Certiorari to the Indiana Supreme Court

BRIEF OF *AMICI CURIAE* JUDICIAL WATCH, INC. AND ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTERESTS OF THE *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 2

The Eighth Amendment Must Check the Natural Temptations of Governments to Abuse Forfeiture Powers and Must Protect the Privilege of All Americans to Be Free From Unjust Government Theft of Private Property 2

CONCLUSION 8

TABLE OF AUTHORITIES

PAGE

CASES

Browning-Ferris Indus. v. Kelco Disposal, 492 U.S. 257 (1989) 4, 5

Harmelin v. Michigan, 501 U.S. 957 (1991) 5

Lee v. Minner, 458 F.3d 194 (3d Cir. 2006) 6

Leonard v. Texas, 138 S. Ct. 1448 (2017) 3, 4

McDonald v. City of Chicago, 561 U.S. 742 (2010) 7

Supreme Court of New Hampshire v. Piper, 470 U.S. 274 (1985) 6

United States v. Bajakajian, 524 U.S. 321 (1998) 5

Wayside Church v. Van Buren Cty., 847 F.3d 812 (6th Cir. 2017) 3, 4

CONSTITUTIONAL PROVISIONS

U.S. const., amend. VIII 4

U.S. const., amend. XIV, sec. 1 7

OTHER AUTHORITIES

Montesquieu, THE SPIRIT OF THE LAWS, Book 6, ch. 9 (Cambridge Univ. Press 1989) (1748) 6

Thomas J. Fitton, President, Judicial Watch, *Testimony Before New York State Assembly* (December 9, 2014), available at http://www.judicialwatch.org/wp-content/uploads/2014/12/CivilForfeiture NYTestimony1209014-tf.pdf.....3

U.S. Department of Justice, *Attorney General Sessions Issues Policy and Guidelines on Federal Adoptions of Assets Seized by State or Local Law Enforcement*, Press Release (July 19, 2017), available at https://www.justice.gov/opa/pr/attorney-general-sessions-issues-policy-and-guidelines-federal-adoptions-assets-seized-state 3

INTERESTS OF THE *AMICI CURIAE* [1]

Judicial Watch, Inc. ("Judicial Watch") is a non-partisan educational organization that seeks to promote transparency, accountability and integrity in government and fidelity to the rule of law. Judicial Watch regularly files *amicus curiae* briefs to advance its public interest mission and has appeared as *amicus curiae* in this Court on several occasions.

The Allied Educational Foundation ("AEF") is a nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study. AEF regularly files *amicus curiae* briefs to advance its purpose and has appeared as *amicus curiae* in this Court on several occasions.

The decision by the Indiana Supreme Court raises important issues of constitutional law that should be addressed by this Court. *Amici* are concerned that the Indiana Supreme Court's ruling, if allowed to stand, will allow state and local government abuses of forfeiture laws to continue. *Amici* believe that freedom from unlawful conversion of property is an inherent individual liberty right which the Constitution must secure for all citizens.

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[1] Pursuant to Supreme Court Rules 37.3 and 37.6, *amici curiae* state that: all parties have consented to the filing of this brief via letters of blanket consent filed with the Clerk, no counsel for a party authored this brief in whole or in part, and no person or entity, other than *amici curiae* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief.

For these and other reasons, *amici* urge the Court to reverse the decision of the Indiana Supreme Court.

SUMMARY OF THE ARGUMENT

The Eighth Amendment "excessive fines" clause must serve as a check against state forfeiture laws. Many state and local governments abuse their powers to seize citizens' property on the barest of pretense to raise revenue without having to raise taxes. When the amount the government can take is limited only by the size of a citizen's bank account, the Courts must apply special scrutiny to prevent corrupt practices. The Eighth Amendment was designed to limit these kinds of easily-abused punitive laws, and it applies to the states via the Privileges or Immunities clause of the Fourteenth Amendment.

ARGUMENT

The Eighth Amendment Must Check the Natural Temptations of Governments to Abuse Forfeiture Powers and Must Protect the Privilege of All Americans to Be Free From Unjust Government Theft of Private Property

Forfeiture laws for the seizure of private citizens' property are easily-abused tools of governments. Unsurprisingly, the ease with which these laws can be abused has led to many instances of actual abuse. "This system—where police can seize property with limited judicial oversight and retain it for their own

use—has led to egregious and well-chronicled abuses." *Leonard v. Texas*, 138 S. Ct. 1448 (2017) (cert. denied) (Statement of Justice Thomas). Indeed, vesting such powers in government authorities without ensuring proper checks against misuse are in place virtually guarantees abuse. *See e.g. Wayside Church v. Van Buren Cty.*, 847 F.3d 812, 823 (6th Cir. 2017) ("In this case the defendant Van Buren County took property worth $206,000 to satisfy a $16,750 debt, and then refused to refund any of the difference. In some legal precincts that sort of behavior is called theft.") (Kethledge, dissenting).

Occasionally, the abuse takes the form of governments using forfeiture laws to fill their coffers instead of raising taxes. *See* Thomas J. Fitton, President, Judicial Watch, *Testimony Before New York State Assembly* (December 9, 2014) ("[T]he New York Police Department [has] broad authority to seize currency and property whenever an arrest is made. Because seized assets are used to fund the NYPD's pension fund and for other law enforcement purposes, the system creates a perverse incentive.").[2] The U.S. Department of Justice acknowledged these risks of abuse *even while rescinding* its modest prior reform, which slightly limited the federal government's ability to aid and abet state and local civil asset forfeitures. *See* U.S. Department of Justice, *Attorney General Sessions Issues Policy and Guidelines on Federal Adoptions of Assets Seized by State or Local Law Enforcement*, Press Release (July 19,

[2] Available at http://www.judicialwatch.org/wp-content/uploads/2014/12/CivilForfeitureNYTestimony1209014-tf.pdf.

2017) ("[T]he federal government will not adopt seized property unless the state or local agency involved provides information demonstrating that the seizure was justified by probable cause.... In addition to these safeguards... Department attorneys [should] proceed with an abundance of caution when handling all forfeitures involving vehicles and especially residences.").[3]

And where both the due process clause (*Leonard v. Texas*) and takings clause (*Wayside Church*) have not always been held as constitutional checks on governments' punitive seizure of property, the Eighth Amendment was designed for it. U.S. const., amend. VIII.

The excessive fines clause of the Eighth Amendment traces its roots to the English Bill of Rights, and before that the Magna Carta. *Browning-Ferris Indus. v. Kelco Disposal*, 492 U.S. 257, 270-271 (1989) ("The barons who forced John to agree to Magna Carta sought to reduce arbitrary royal power, and in particular to limit the King's use of amercements as a source of royal revenue, and as a weapon against enemies of the Crown."). The way to determine if a fine was excessive was to look at the gravity of the illegal behavior, the size of the fine relative to the behavior, whether the fine's purpose or effect was to bankrupt a violator, and whether the exact amount of the fine had been set by a jury or demo-

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[3] Available at https://www.justice.gov/opa/pr/attorney-general-sessions-issues-policy-and-guidelines-federal-adoptions-assets-seized-state.

cratically accountable body. *Browning-Ferris Indus.* at 271.

Recently, this Court explained the factors to determine if a fine is excessive include whether a legislative body set the amount of the fine, and whether the fine is grossly disproportionate to the gravity of the offense. *United States v. Bajakajian*, 524 U.S. 321, 336 (1998). Then as now, when a government appears to be relying on fines to raise revenues, the judiciary must scrutinize the fines to ensure they are intended and effective at reducing crime and not just at filling state coffers:

> There is good reason to be concerned that fines, uniquely of all punishments, will be imposed in a measure out of accord with the penal goals of retribution and deterrence. Imprisonment, corporal punishment, and even capital punishment cost a State money; fines are a source of revenue. As we have recognized in the context of other constitutional provisions, it makes sense to scrutinize governmental action more closely when the State stands to benefit.

Harmelin v. Michigan, 501 U.S. 957, at 980, fn 9 (1991).

The idea that excessive forfeitures will deter crime by financially devastating offenders always requires scrutiny. First, such penalties necessarily

allow a large margin of error for punishing innocent people – especially when forfeitures are applied without a criminal conviction. Furthermore, whether the forfeiture is civil, criminal, or administrative, when alleged or actual violations are routinely met with harsh penalties, the result is ever-increasing government punishments are needed to deter crime at all. Once citizens become inured to governments confiscating their wealth over minor or merely alleged transgressions, ordinary and reasonable penalties lose their deterrence value. "Severity in penalties suits despotic government, whose principle is terror..." Montesquieu, THE SPIRIT OF THE LAWS, Book 6, ch. 9, at 82 (Cambridge Univ. Press 1989) (1748).

The inherent right of U.S. citizens to be free from excessive financial penalties is not one held exclusively against the federal government. It is therefore proper that the Eighth Amendment be applied to state and local governments, because the ability to live free of unjust government financial penalties both "play[s] an important role in furthering a vital national economy" as well as "vindicat[es] individual and societal rights." *Lee v. Minner*, 458 F.3d 194, 199-200 (3d Cir. 2006) (citations and punctuation omitted); *see also Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 280-81 (1985). The issue is whether states may impose "excessive" fines at all, not whether they may only levy "excessive" fines when accompanied by adequate procedural safeguards to ensure the excessive fines are being applied fairly. As Justice Thomas explained:

> [T]he Court concludes that the right to keep and bear arms applies to the States through the Fourteenth Amendment's Due Process Clause because it is 'fundamental' to the American 'scheme of ordered liberty,' and 'deeply rooted in this Nation's history and tradition.' I agree with that description of the right. But I cannot agree that it is enforceable against the States through a Clause that speaks only to 'process.' Instead, the right to keep and bear arms is a privilege of American citizenship that applies to the States through the Fourteenth Amendment's Privileges or Immunities Clause.

McDonald v. City of Chicago, 561 U.S. 742, 806 (2010) (Thomas, concurring) (citations omitted, cleaned up); U.S. const. amend. XIV, § 1.

CONCLUSION

For all the foregoing reasons, *amici* respectfully request that the Court reverse the Indiana Supreme Court decision.

Respectfully submitted,

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